

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 JAMES REGINALD BARNES,

12 Petitioner,

13 v.

14 DOUG WADDINGTON,

15 Respondent.

16 Case No. C06-5214FDB

17 REPORT AND
18 RECOMMENDATION

19 Noted for **November 10, 2006**

20 Petitioner is a state prisoner currently incarcerated at the Stafford Creek Corrections Center
21 pursuant to a February 23, 2000, convictions for First Degree and Attempted First Degree Theft arising
22 out of Pierce County. Petitioner seeks federal habeas relief under 28 U.S.C. § 2254 challenging his state
23 convictions. The matter is before the court on Respondent's motion to dismiss (Doc. 14). After a careful
24 review of the record, the undersigned submits the following report and recommends that the Court deny
25 the petition for writ of habeas corpus as untimely.

26 DISCUSSION

27 A one-year period of limitation applies to federal petitions for writ of habeas corpus. The relevant
28 statute states:

29 (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas
30 corpus by a person in custody pursuant to the judgment of a State court. The limitation
31 period shall run from the latest of --

32 (A) the date on which the judgment became final by conclusion of direct
33 review or the expiration of the time for seeking such review;

1 (B) the date on which the impediment to filing an application created by
 2 State action in violation of the Constitution or laws of the United States is
 3 removed, if the applicant was prevented from filing by such State action;

4 (C) the date on which the constitutional right asserted was initially
 5 recognized by the Supreme Court, if the right has been newly recognized by
 6 the Supreme Court and made retroactively applicable to cases on collateral
 7 review; or

8 (D) the date on which the factual predicate of the claim or claims presented
 9 could have been discovered through the exercise of due diligence.

10 (2) The time during which a properly filed application for State post-conviction or
 11 other collateral review with respect to the pertinent judgment or claim is pending shall not
 12 be counted toward any period of limitation under this subsection.

13 28 U.S.C. § 2244(d).

14 The one year period of limitation is subject to equitable tolling, thus, the period may be equitably
 15 tolled by the court “if ‘extraordinary circumstances’ beyond a prisoner’s control make it impossible to file a
 16 petition on time.” *Id.* at 1288, *citing Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1997).
 17 The Ninth Circuit commented, “We have no doubt that district judges will take seriously Congress’s desire
 18 to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is
 19 surmounted.” *Id.* at 1289. The Supreme Court recently held, “that time limits, no matter their form, are
 20 ‘filing’ conditions. Because the state court rejected petitioner’s PCRA petition as untimely, it was not
 21 properly filed, and he is not entitled to statutory tolling under § 2244(d)(2). *Pace v. DiGuglielmo*, 544
 22 U.S. 408, 125 S. St. 1807, 1814 (2005).

23 Here, petitioner was convicted and sentenced by the state trial court on or about February 29,
 24 2000. Mr. Barnes immediately appealed this conviction and the direct appeal process ended on April 1,
 25 2003, when the State Supreme Court issued its decision denying review. The State Court of Appeals
 26 entered its mandate on April 30, 2003. Petitioner also filed several collateral challenge to his sentence and
 27 convictions in the state courts. The first round of the state court collateral challenges ended on or about
 28 February 20, 2004, when the State Supreme Court denied review of Mr. Barnes’ Personal Restraint
 Petition. Mr. Barnes’ subsequent attempt to challenge his convictions and sentences was time barred by
 the State Court of Appeals, which was affirmed by the Washington State Supreme Court.

29 Giving Mr. Barnes the benefit of any doubt, the federal one-year period of limitation started to run
 30 on April 26, 2004, when the Washington Court of Appeals entered a certificate of finality, following the

1 State Supreme Court's refusal to review his Personal Restraint Petition. Unless tolled for a legitimate
2 reason, the one year period expired one year later, or on or about May 1, 2005. The court finds no
3 reason to toll the period of limitations beyond this date. Mr. Barnes filed subsequent state court
4 proceedings, but they were properly time barred by the state courts and thus were not properly filed and
5 cannot constitute a basis for tolling the federal one-year period of limitation. Mr. Barnes did not file his
6 writ of habeas corpus with this court until April 18, 2006, well after the one-year time limit had expired.

7 CONCLUSION

8 Petitioner did not timely filed his petition for writ of habeas corpus. Respondent's motion to
9 dismiss the petition should be GRANTED. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the
10 Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file
11 written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those
12 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit
13 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **November 10, 2006**, as
14 noted in the caption.

15 DATED this 20th day of October, 2006.

16 */s/ J. Kelley Arnold*
17 J. Kelley Arnold
18 United States Magistrate Judge
19
20
21
22
23
24
25
26
27
28